United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1311

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 74-1311

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P/S

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs-Appellees-Appellants,

- against -

HOWARD H. CALLAWAY, individually and as Secretary of the Army, Department of Defense, U.S.A., LT. GENERAL WILLIAM C. GRIBBLE, JR., individually and as Chief of Engineers, Corps of Engineers, U.S. Army, and COL. HARRY W. LOMBARD, individually and as District Engineer, New York District, Corps of Engineers, U.S. Army,

Defendants-Appellees,

- and -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant-Appellant-Appellee.

CROSS-APPEALS

REPLY BRIEF OF SCENIC HUDSON, THE HUDSON RIVER FISHERMEN, THE SIERRA CLUB and THOMAS R. LAKE

Dated: May 20, 1974

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INTRODUCTORY STATEMENT

This reply brief is submitted on behalf of Scenic Hudson Preservation Conference, the Hudson River Fishermen's Association, the Sierra Club and Thomas R. Lake ("Plaintiffs") in response to the answering briefs of the Corps of Engineers and Con Edison on Plaintiffs' cross-appeal.

By its appeal, Con Edison seeks the right to dump some 47,000,000 cubic feet of fill material into 40 acres of the Hudson River at Storm King Mountain without complying with the Federal Water Pollution Control Act Amendments of 1972 [33 U.S.C. §1251 et seq.]. The District Court, by Judge Lasker, held that the Company must first secure a discharge permit under Section 404 of the Amendments [33 U.S.C. §1344] and enjoined the Company from filling in the 40 acres of the River unless and until such a permit is obtained. At the same time, the District Court concluded that a dredging permit under Section 10 of the Rivers and Harbors Act of 1899 [33 U.S.C. §403] was not required for the operations at Storm King. Con Edison subsequently appealed the Section 404 holding, and Plaintiffs cross appealed on the limited scope of injunctive relief granted by the District Court and the rejection of their Section 10 claims.

POINT ONE

THE DISTRICT COURT ERRED IN LIMITING THE SCOPE OF INJUNCTIVE RELIEF TO THE ACTUAL DISCHARGE OF FILL MATERIAL

In their cross-appeal, Plaintiffs contend that the District Court erred in confining the scope of its injunctive relief to the actual discharge of dredged or fill material into the Hudson. Con Edison, in its answering brief, completely misconstrues Plaintiffs' position on this issue.

Plaintiffs are not, as Con Edison alleges, asking that all construction at Storm King be barred. Rather, Plaintiffs ask only that the injunction be extended to construction activities generating fill material. Plaintiffs submit that Con Edison should not be allowed to dig up Storm King Mountain, build up a giant pile of rubble and let this rubble weigh in the Corps of Engineers' decision as to its proper disposal.

Plaintiffs' contention is squarely in line with an ever-increasing number of circuit court cases holding that evaluation of environmental impacts should precede, not follow, project construction. Such a position was first taken by the District of Columbia Circuit in Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109, 1128 (D.C. Cir. 1971), and by the Second Circuit in Citizens Committee to Protect the Hudson Valley v. Volpe, 425 F.2d 97 (1970), cert. denied 404 U.S. 949 (1971). This Court recently reemphasized its support for unpressured decision-making in Hudson River Fishermen's Association v. Federal Power Commission (Case Nos. 73-2258, 2259, 2d Cir., May 8, 1974), where, in directing immediate hearings on problems of fish protection at Storm King, Judge Anderson stated:

> "The environmental groups, who have so assiduously prosecuted this appeal, should not be faced with the fait accompli of an operating plant before any modifications are considered." (Slip Opinion, p. 3374)

Similarly, in the context of this case, neither the plaintiffs nor the Corps should be faced with the fait accompli of waste rock piled near the shore ready for dumping, when the merits of that dumping have not yet been determined.

From Con Edison's point of view, of course, it is all part of a conspiracy by Scenic Hudson. In its eyes, it is "[n]ot a desire to vindicate any rights under §404, but a desire to endlessly delay the project" that explains Scenic Hudson's request for expanded injunctive relief (Con Ed Reply Brief, p. 8). But this is simply not so. There are essential 404 rights that we seek to vindicate -- and we are hardly alone in this. The National Marine Fisheries Service, for example, has sharply criticized the proposed dumping operations in its formal comments to the Corps of Engineers (see Appendix A to this Brief). Yet if excavation is permitted to continue, leading to greater and greater pressure to allow the ultimate dumping, these criticisms may well be overborne by economic reality. For this reason, it is critical that the status quo be maintained by expanding the injunctive relief as Plaintiffs have requested.

Nor would such an expansion of relief jeopardize Con Edison's FPC license as the Company has claimed. To the contrary, Con Ed has already begun construction of the project works at the site, and this is all that either the Federal Power Act or the license requires. Furthermore,

we do not ask for a restraint against any work except that which would directly result in the creation of fill which will eventually have to be dumped. This would leave the Company great leeway, not only in the reservoir area but even to a considerable extent at the waterfront. Indeed, both in affidavits [e.g., McElwee, R. 55a, ¶¶16-17] and at oral argument before Judge Lasker on the Plaintiffs' motion to amend, Con Edison laid great emphasis on the fact that the initial excavation would not result in fill material, but only in foundation rock for a haul road. For it now to claim to this Court -- in direct contrast to its representations to Judge Lasker -- that expended injunctive relief would bring all work to a halt, is, we respectfully submit, unconscionable (and, we might add, completel, unsupported in the record).

POINT TWO

PERMITS UNDER SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 ARE REQUIRED FOR DREDGING AND FILLING OPERATIONS AT STORM KING

In their cross appeal, Plaintiffs also contend that the District Court erred when it concluded that no permits under Section 10 of the 1899 Rivers and Harbors Act [33 U.S.C. §403] are required for dredging and filling operations at Storm King. Both the Corps and Con Ed dispute this claim, asserting that the legislative history of the

Power Act establishes conclusively that the Corps' usual Section 10 authority was, in the case of hydro plants, transferred to the FPC in 1920.

The legislative history does indeed indicate that under the Power Act, the functions of the Departments of War, Interior and Agriculture were to be "coordinated through a commission composed of the heads of these departments". [House Report No. 61, 66th Cong., 1st Sess., quoted in the Corps' brief at p. 10]. But this same history, developed in 1918 and 1919, in no way suggests that the powers of the respective secretaries were to be brought to an end. To the contrary, as we noted in our initial brief (pp. 46-47), there was a rather clear understanding that the powers of the Secretary of War were to continue, though as a member of the Commission he would exercise them within that context. However, when in 1930 the Commission was reconstituted as an "independent" five-man body, with the Secretary no longer a member, there is nothing to indicate that his separate powers were then surrendered to the Commission.

The Corps argues in its brief, however, that under Section 4(e) of the Power Act [16 U.S.C. §797(e)], the Corps of Engineers must give its approval to the navigational aspects of any proposed hydro plant, and that no purpose would be served if a separate Section 10 permit requirement

were validated. But we respectfully submit that this is to ignore the scope and depth of the required Section 10 review, as compared to the narrow and summary procedures used by the Corps in giving "FPC approvals." In this case, for example, the Corps' comments to the FPC were contained in brief one page letters lacking completely in details [R. 91a, 103a]. By contrast, the Section 10 permits issued with respect to the plant included maps and specific descriptions and had clearly been subject to far more detailed analysis than the pro forma comments to the FPC [R. 92a-101a]. Far from duplication, in short, Section 10 analyses are essentially the only way that the Corps exercised <u>any</u> regulatory role in this case.*

The Corps and Con Edison also contend that the Corps' past and current administrative practice support the proposition that no separate Section 10 permits are required for Storm King. Yet in this case itself, three Section 10

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* By contrast, the FPC concern over the dredging and filling operation at Storm King was essentially nil. Thus, except for the Commission's consistent lauding of the suburban park that would be mounted on the fill, there is nothing in its opinion reflecting any concern for the aquatic impacts of the dredging or filling, or the consequences on water quality, or resulting turbidity, or anything at all. See FPC Opinion No. 584 (Con Edison of N.Y., Inc., Project No. 2338), 44 FPC 359 (August 19, 1970).

permits were issued, including two after the FPC granted the initial Project license. Furthermore, contrary to the Corps' claims, its proposed regulations (which presently serve as the guidelines for Corps' action) do not support the thesis that the Corps' Section 10 jurisdiction over hydro plants has been relinquished to the FPC. To the contrary, Section 209.120(c)(6) of those regulations provides only that, in the case of hydro applications,

> "The interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions rather than the issuance of a separate Department of the Army permit under [Section 10]." (emphasis added)

Far from reflecting a transfer of jursidiction, the insertion of the word "normally" clearly indicates an attitude of continuing authority when circumstances require; and that, we submit, was what was required here.

In similar fashion, the Corps' citation to its current regulations (33 CFR §209.120(d)(9), quoted at pp. 7-8 of the Corps' brief) lends little support to its disclaimers of jurisdiction. For these regulations were issued only in late 1968 -- 48 years after the Power Act was passed -- and what happened during this period? Mr. DeSista, Chief of the Corps' Regulatory Function Branch, claims that the Corps' policy was to coordinate with the FPC, rather than to issue separate permits [R. 125a]. Yet for all his

words, Mr. DeSista did not provide one shred of evidence in support of this claim. The purported policy was not reflected in any regulations before 1968, nor in any other written document; and by Mr. DeSista's own admission, some Section 10 permits have indeed been issued for FPC projects [R. 126a]. Under these circumstances and in view of the Corps' proposed regulations which confirm, rather than detract from, a retention of jurisdiction, we respectfully submit that the Corps' prior administrative practice in this case was not, as it now claims, a departure from the norm. When it issued Section 10 permits in 1965, it was following the law; and when it failed to hold Con Ed to the same requirements in 1973, it acted illegally.

POINT THREE

SOME LIMITED OBSERVATIONS ON SECTION 404

We have already answered Con Edison's claims regarding Section 404 in our initial brief, and we shall not repeat those points here. We should, however, like to make the following observations.

First, if Section 23(b) of the Federal Power Act [16 U.S.C. §817] were read as restrictively as Con Ed insists that it must be (Con Ed. Brief, p. 3), then there would be no room for the application of any other statute of any kind to hydroelectric plants. The Power Act alone would

control. Yet this is clearly not the case. As but one example, the National Environmental Policy Act has been held applicable to hydro projects by this court and with respect to this very plant. Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972); and similarly, Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), cert denied, 409 U.S. 849 (1972).

Second, in continuing to invoke Section 28 of the Power Act in its behalf [16 U.S.C. §822], the Company no longer cites as the basis of application "the need to provide security in capital." The reason for this is obvious; as noted in our initial brief, the Company has invested essentially nothing in reliance on its license. Thus, even if Section 28 applied on its face, which it obviously does not, the substantive basis for application is entirely lacking here.

Third, we simply note, in respect of Con Edison's claim that there are no environmental impacts which have not been fully weighed, that this Court, in the last 10 days, has indicated its view that the dangers have not been fairly evaluated; that the National Marine Fisheries Service believes the dumping operations contrary to the public interest; and that one can search the FPC opinion endlessly and find not the slightest concern expressed for the impacts

of filling. That, of course, is why Congress adopted Section 404 and it is a Section that legally and factually must be applied here if the intent of Congress to protect our national waters is to be carried out.

CONCLUSION

For the reasons set forth above and in the Plaintiffs' initial brief, the judgment of the District Court should be affirmed in respect to Section 404, but the scope of the injunctive relief should be broadened. The judgment of the District Court as to the application of Section 10 should be reversed and that Section held applicable to Con Edison's dredge and fill activities at Storm King Mountain.

Dated: New York, New York
May 17, 1974

Respectfully submitted,

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U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northeast Region
Federal Building
14 Elm Street
Gloucester, Massachusetts 01930

April 16, 1974

Col. Harry W. Lombard
District Engineer
New York District
U.S. Army Corps of Engineers
26 Federal Plaza
New York, New York 10007

Dear Colonel Lombard:

The National Marine Fisheries Service has reviewed project plans relative to Public Notice No. 7549, issued February 26, 1974, which describes an application for a Section 404 permit by the Consolidated Edison Company of New York to place fill material, to backfill a trench for transmission line burial, and to discharge spoil in conjunction with construction of a temporary cofferdam in the Hudson River at the Village of Cornwall in connection with the Cornwall Pumped Storage Generating Station. Our comments are submitted in accordance with the provisions of the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 et seq.), and have been coordinated with the U.S. Fish and Wildlife Service.

Several issues regarding the proposed project are of major concern to this agency, the foremost of which is the fact that all project features are directly related to the construction and subsequent operation of a substantial pumped storage electrical generating facility. In this regard we note that considerable controversy exists relative to the actual and potential adverse effects of utilizing the Hudson River as a source of water for the facility. Entrainment of a wide variety of aquatic organisms will occur, including eggs, larvae and juvenile stages of fishes as well as various life stages of invertebrate organisms. Notably included will be white perch, striped bass, tomcod, alewife, blueback herring, and American shad, and to a lesser extent, other species which inhabit the Hudson River during all or part of their life cycles, including the shortnose and Atlantic sturgeon, both rare and endangered species. We also anticipate that substantial numbers of screenable organisms will be impinged upon intake screens if such devices are incorporated into the facility design. Should intake screens not be used, potentially screenable-size organisms will also be entrained as Hudson River water is pumped up and into the mountain-top storage reservoir. These several issues have yet to be adequately resolved. While we are aware that the Federal Power Commission has elected to issue a license for the project, the many biological factors still remain paramount questions from the standpoint of this agency's legislated responsibilities.

Of additional concern is the proposal to fill approximately 40 acres of shoal water in connection with construction of a public park facility. The habitat to be eliminated if the project is implemented will reduce the amount of nursery area available for a number of species. Significantly, we understand the shoal area along this section of the Hudson River plays an important role during the early life of the striped bass as well as several other species. It appears the purpose of disposal as proposed is to provide a means of eliminating waste rock and other spoil material during the process of constructing the pump storage generating facility. Creation of a public park, however, appears to be a secondary project feature. Both elements are, in our opinion, neither water dependent nor in the best public interest. Additionally, we conclude that feasible alternatives to disposal of spoil material, as proposed, exist which have not been evaluated.

Among several additional factors which we believe are principal concerns is the proliferation of electrical generating facilities utilizing the Hudson River. Clearly, the "Cornwall Project" should not be evaluated only as a single "user" of the Hudson River. We believe it absolutely necessary to evaluate any actual and potential effects associated with the pumped storage facility in an integrated manner relative to the total Hudson River power plant complex. This essential element of the mandated environmental review process represents the only responsible avenue available through which a total ecosystem approach to power development can be consummated.

In recognition of the issues heretofore expressed and recognizing that the New York District Corps of Engineers office finds it necessary and desirable to prepare a supplemental environmental report relative to the project, we strongly recommend that further action regarding Public Notice No. 7549 be held in abeyance until the supplemental report is made available for review together with an adequate opportunity for comments to be forwarded to your office.

Sincerely yours,

William G. Gordon

for Russell T. Norris
Regional Director

CERTIFICATE OF SERVICE

I hereby certify that two copies each of the attached Reply Brief of Scenic Hudson Preservation Conference, et al. were served May 17, 1974, by first class mail, properly addressed, on counsel for Con Edison and Government Appellees as follows:

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May 20, 1974